

Durham North Carolina

Durham County/
City of Durham, North Carolina

Multi-jurisdictional
Disparity Study
October, 2014



235 Peachtree Street, N.E. | Suite 400 | Atlanta, GA 30144
p. 404.584.9777 | f. 404.584.9730 | gspclaw.com

Durham

North Carolina

Executive Summary



INTRODUCTION

In 2013, the City of Durham, NC (“City”) and Durham County, NC (“County”) jointly contracted with Griffin & Strong, P.C. (“GSPC”) to conduct a comprehensive disparity study (“Study”) to examine and analyze the procurement policies and practices of both the City and the County and their prime contractors. GSPC sought to ascertain the participation and utilization of Minority and Women owned businesses (“MWBE”) that are eligible to provide goods and services to either the City of Durham, Durham County, or both.

The goal of the Study was to determine whether there exists a statistically significant disparity between the number of available MWBEs in the Durham marketplace and the number of these firms that have been awarded contracts from the City, the County, or their prime contractors. The Study also will be used to determine if a legal predicate exists to maintain or create any remedial programs under City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Durham City and County, and other governmental entities across the country, authorize disparity studies in response to Croson and subsequent cases in order to determine whether there is a compelling interest for the continuation and creation of remedial procurement programs, based upon race, gender, and ethnicity. In order for the legal requirements of Croson to be satisfied, GSPC must determine whether the City or the County have been a passive or active participants in discrimination with regard to the access of MWBEs in their procurement processes, or whether their existing programs, the City’s Equal Business Opportunity (“EBO”) Program and the County’s Minority and Women Business Program, have eliminated the need for any such remedial programs.

To achieve these ends, GSPC analyzed the contracting and subcontracting activities of the County and its prime contractors during the five (5) year period beginning July 1, 2007, to June 30, 2012 (“Study Period”), and evaluated various options for future program development.

The principal objectives of this Study were:

- to determine whether the City or County, either in the past or currently, engages in discriminatory practices in the solicitation and award of contracts, in the business categories of Construction, Architecture & Engineering, Services, and Goods;
- to determine if a legally justified need continues to exist for any or all of Durham City and County's efforts in accordance with the guidelines set forth by the Supreme Court and relevant subsequent cases; and
- to provide recommendations as to suggested actions to be taken by the City or the County as a result of the findings of the Study, including serious consideration of race-neutral program options.

TECHNICAL APPROACH

In conducting this Study and preparing its recommendations, GSPC followed a carefully designed work plan that allowed Study team members to fully analyze availability, utilization, and disparity with regard to MWBE participation in both jurisdictions. The final work plan consisted of, but was not limited to, the following major tasks:

- establishing data parameters and finalizing a work plan;
- legal analysis;
- policy and procurement process review and race-neutral program analysis;
- collecting, organizing, and cleaning data;
- conducting market area analyses;
- conducting utilization analyses;
- determining the availability of qualified firms;
- analyzing the utilization and availability data for disparity and statistical significance;
- conducting private sector analysis including credit and self-employment analysis;
- collecting and analyzing anecdotal information; and
- preparing a final report that presents race- and gender-neutral and narrowly tailored
- race- and gender-based remedies if indicated by the findings.

PROJECT TEAM

- Rodney K. Strong, Esq., CEO, Griffin & Strong, P.C.
- Dr. Gregory Price, Senior Economist, Morehouse College
- Michele Clark Jenkins, J.D., Senior Director and Project Manager, Griffin & Strong, P.C.
- Imani Strong, Deputy Project Manager, Griffin & Strong, P.C.
- Ken Weeden & Associates, Anecdotal Interviews
- Oppenheim Research, Inc., Telephone Survey
- Gaither & Co., Data Entry Supervision
- Monarch Services, Data Entry

About the Project Team—Griffin & Strong, P.C.

Griffin & Strong, P.C. is a professional corporation based in Atlanta, Georgia, that is actively engaged in the practice of law, as well as governmental and private consulting. Since the firm's inception in 1992, the public policy consulting division has been continuously directed and controlled by Rodney K. Strong. Attorney Strong has an extensive background in the area of public contracting with specific experience conducting disparity studies. Gregory Price, Ph.D., served as Senior Economist for this Study and reviewed all quantitative aspects of the Study. Michele Clark Jenkins, as the Project Manager, was responsible for the day-to-day aspects of the Study and for executing the methodology. Mrs. Jenkins has extensive experience in managing disparity studies, bench-markings, and goal settings. Imani Strong served as Deputy Project Manager and supported all activities of the Study. Ms. Strong's expertise in anthropological studies and prior experience on GSPC studies made her an asset to the execution of this Study, particularly in the analysis of the anecdotal evidence. Susan Johnson handled the administration of the Study particularly with regard to subcontractor tracking and payments.

Other Members of the Project Team

- Founded in 1989, Ken Weeden and Associates (“KWA”) is a North Carolina-based full service DBE-HUB-MWBE-SBE programs consulting firm, with offices in Raleigh and Wilmington. KWA has nearly 25 years’ experience in all phases of data collection, compilation, and analysis, for the development and implementation of minority and women-business enterprise programs. The firm is a nationally recognized specialist in DBE programs (49 CFR Parts 26, and 23), having assisted more than 10 USDOT entities, including the NCDOT. It has been responsible for data collection, anecdotal data collection and compilation and conducting surveys for several leading companies on disparity studies.
- Monarch Services is a minority-owned business that is based in Durham and has been providing personnel solutions to its clients for over forty years. Its clients include Fortune 500, federal, state and local governments and small businesses. The firm provided data entry and data collection personnel. They previously worked with us on the Durham County Disparity Study in 2006. Monarch Services is a Black American woman-owned business, certified by the City of Durham and by the North Carolina Department of Administrative Services as an HUB.
- Oppenheim Research, Inc., is a Florida-based women-owned, full-service market research firm with over 35 years of experience serving public and private entities. Some of their services include telephone interviews, focus group, and mail survey data. For this project, they conducted the telephone survey.



LEGAL ANALYSIS

Government initiatives which seek to employ "race conscious" remedies to ensure equal opportunity must satisfy the most exacting standards in order to comply with constitutional requirements. These standards and principles of law were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469; 709 S.Ct. 706(1989), and Adarand Constructors, Inc. v. Peña, 515 U.S. 200; 115 S.Ct. 2097 (1995). The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities based on race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the Federal Government.

In rendering the Croson decision in 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that majority-owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority-owned subcontractors--violated the equal protection

clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race conscious measures to allocate, or "set aside," a portion of public contracting exclusively to minority-owned businesses must withstand a "strict scrutiny" standard of judicial review. The "strict scrutiny" test requires public entities to establish race- or ethnicity-specific programs based upon a compelling governmental interest and that such programs be narrowly tailored to achieve the governmental interest¹ The "strict scrutiny" test further requires a "searching judicial inquiry into the justification" for the race-conscious remedy to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of social inferiority or simple social politics".²

In Croson, the Court stated that identified anecdotal accounts of past discrimination also could provide the basis to establish a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials, alone, would not suffice.

In addition, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in Richmond. In order to uphold a race- or ethnicity-based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or congressional findings of discrimination in the national economy.

In order for a local governmental entity to enact a constitutionally valid MWBE ordinance which awards contracts, it must show a compelling governmental interest. This compelling interest must be proven by particularized findings of past discrimination. North State Law Enforcement Officers Assn v. Charlotte-Mecklenburg Police Dep't, 862 F. Supp. 1445, 1451 (W.D.N.C. 1994). The "strict scrutiny" test ensures that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype. Moreover, courts have ruled that general societal discrimination is insufficient proof to justify the use of race-based measures to satisfy a compelling governmental interest. Rather, there must be some showing of prior⁴ discrimination by the governmental actor involved, either as an "active" or "passive" participant. Croson, 488 U.S. at 498. Even if the governmental unit did not directly discriminate, it can take corrective action. Even if the governmental unit did not directly discriminate, it can take corrective action. As the Court noted in Tennessee Asphalt v. Farris, "[g]overnmental entities are not restricted to eradicating the effects only of their own discriminatory acts." 942 F.2d 969, 974 (6th Circuit 1991).

The governmental entity must point to specific instances or patterns of identifiable discrimination in the area and in the industry to which the plan applies. "Without question, remedying the effects of past discrimination is a compelling state interest. A *prima facie* case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan. However, generalized

assertions that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress. Croson, 488 U.S. at 498-99. See Miller, 515 U.S. at 921.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.⁶ Where gross statistical disparities exist, they alone may constitute *prima facie* proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong statistical evidence. Anecdotal⁷ evidence is rarely so dominant that it can, by itself, establish discrimination under Croson. The "combination of anecdotal and statistical evidence," however, is viewed by the Courts as "potent." Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991). If there is a strong basis in evidence to justify a race- or ethnicity-based program, the next step of the "strict scrutiny" test is to determine whether the MWBE program is narrowly tailored to redress the effects of discrimination. In Croson, the Court considered four factors:

- whether the City has first considered race-neutral measures, but found them to be ineffective;
- the basis offered for the goals selected;
- whether the program provides for waivers; and,
- whether the program applies only to MBEs who operate in the geographic jurisdiction covered by the program.

Twenty-five years of litigation following the Croson decision presents governments with continued evolution of the law in the area of remedial programs and processes used to ameliorate inequities concerning MWBE utilization in public contracting. In this study, the Griffin & Strong P.C. team evaluated both the quantitative and the qualitative evidence within the requirements of Croson and its progeny, to determine whether the City of Durham and/or the County of Durham have been active or passive participants in past or present discrimination, that warrant and permit such remediation. The overall findings and recommendations are presented in the following pages.

FINDING 1

City of Durham - Overall MWBE Prime Utilization

The City of Durham spent \$206.1 million in the various Relevant Markets during the Study Period. 2.66% or \$5.5 million was spent with minority and female owned firms across all procurement categories at prime level.

**Table 1: City of Durham MWBE Prime Utilization in the Relevant Market
(Awards 7/1/2007-6/30/2012)
Awards over \$30,000**

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
Black American	\$1,543,750	1.45%	\$1,060,994	3.85%	\$1,518,296	2.34%	\$0	0%	\$4,123,040	2.00%
Asian American	\$0	0%	\$57,785	0.21%	\$0	0%	\$0	0%	\$57,785	0.03%
Hispanic American	\$0	0%	\$57,931	0.21%	\$0	0%	\$0	0%	\$57,931	0.03%
American Indian	\$0	0%	\$0	0%	\$0	0%	\$0	0%	\$0	0.00%
White Female	\$67,988	0.06%	\$1,092,642	3.96%	\$90,853	0.14%	\$0	0%	\$1,251,483	0.61%
Total MWBE	\$1,611,738	1.51%	\$2,269,352	8.23%	\$1,609,149	2.48%	\$0	0%	\$5,490,239	2.66%
Total Contract Awards	\$106,590,110	100%	\$27,585,266	100%	64,786,228	100%	\$7,155,057	100%	\$206,116,661	100.00%

GRIFFIN & STRONG, P.C. 2014

FINDING 2

City of Durham - Statistically Significant Underutilization of MWBEs as Primes

Griffin & Strong, P.C. found that, in the City of Durham, minority and women owned firms were significantly underutilized as prime contractors in every category for every year of the study period.

Table 2: City of Durham Summary of Statistically Significant MWBE Underutilization in Prime Contracting
July 1, 2007-June 30, 2012

CONSTRUCTION	A/E	SERVICES	GOODS
Black American	Black American	Black American	Black American
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female	White Female	White Female	White Female

GRIFFIN & STRONG, P.C. 2014

FINDING 3

City of Durham - Statistically Significant Underutilization of MWBEs as Subcontractors

In subcontracting, Asian American, Hispanic American, and American Indian owned firms were significantly underutilized every year of the Study Period. Looking at the sum total of the subcontracting during the Study Period, Black American and White Female owned firms showed some overutilization during the Study Period.

Black American owned firms were underutilized during the Study Period in Construction subcontracting, but were overutilized in A/E, Services, and Goods. White Female owned firms were underutilized in Construction and Goods, but over utilized in both A/E and Services.

It is not coincidental that the two groups which are the focus of the City's MWBE program are overutilized as subcontractors in certain areas. This speaks to the effectiveness of the City's current program in these areas. However, with prime contracting with these same two groups being so substantially underutilized as primes, and there being almost no utilization of other minority groups either as primes or subs, there is a clear demonstration that, "but for" the establishment of remedial programs at the City, there is little utilization of minority and women owned businesses with the City of Durham.

The lack of participation of minority owned firms as prime contractors indicates that the City's program may need to be revamped to include components that encourage joint-venturing between smaller firms, the breakdown of larger contracts, and a mentor-protégé program in order to bridge the gap for these businesses into prime contracting.

FINDING 3

Table 3: City of Durham Summary of Statistically Significant MWBE Underutilization in Subcontracting
July 1, 2007-June 30, 2012

CONSTRUCTION	A/E	SERVICES	GOODS
Black American			
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female			White Female
	Non-Minority Male	Non-Minority Male	Non-Minority Male

GRIFFIN & STRONG, P.C. 2014

FINDING 4

Durham County - Overall MWBE Utilization

Durham County spent \$313.6 million in the Relevant Market during the Study Period on contracts (FRs and POs) over \$30,000 and including awards totaling \$30,000 or more to any firm. Including in the utilization are additions to previous years' awards. 6.07% or \$19 million was spent with minority and female owned firms across all procurement categories at prime level during the Study Period.

**Table 4: Durham County- MWBE Prime Utilization in the Relevant Market
(Awards 7/1/2007-6/30/2012)**

Awards over \$30,000 to any firm in any year and including additions to previous years' awards

	Construction	%	A/E	%	Services	%	Goods	%	Totals	%
Black American	\$115,000	0.05%	\$6,944,153	26.71%	\$1,831,247	4.47%	\$546,350	3.74%	\$9,436,750	3.01%
Asian American	\$0	0.00%	\$0	0.00%	\$0	0%	\$0	0%	\$0	0.00%
Hispanic American	\$0	0.00%	\$4,565,900	17.56%	\$0	0%	\$0	0%	\$4,565,900	1.46%
American Indian	\$0	0.00%	\$64,100	.25%	\$30,262	.07%	\$0	0%	\$94,362	0.03%
White Female	\$1,230,998	0.53%	\$139,772	.54%	\$3,307,403	8.08%	\$244,153	1.67%	\$4,922,326	1.57%
Total MWBE	\$1,345,998	0.58%	\$11,713,925	45.06%	\$5,168,912	12.62%	\$790,503	5.40%	\$19,019,338	6.07%
Total Contract Awards	\$231,996,478	100%	\$25,998,400	100%	40,946,761	100%	\$14,627,138	100%	\$313,568,777	100.00%

GRIFFIN & STRONG, P.C. 2014

FINDING 5

Durham County - Statistically Significant Underutilization of MWBEs as Primes

Griffin & Strong, P.C. found that, in Durham County, minority and women owned firms were significantly underutilized as prime contractors in Construction and Services for every year of the Study Period in which there was competitive bidding in contracts over \$30,000.

In A/E and Goods, Hispanic American and Female owned firms were significantly underutilized as prime contractors for every year of the Study Period. Black American owned firms were overutilized in A/E from 2009-2012, primarily because of additions to a previous year's contract to one architectural firm. Black American owned firms were overutilized in 2008 and 2010. Hispanic American owned firms were overutilized in A/E during 2008.



FINDING 5

Table 5: Durham County
Summary of Statistically Significant MWBE
Underutilization in Prime Contracting based on Ownership
July 1, 2007-June 30, 2012

CONSTRUCTION	A/E	SERVICES	GOODS
Black American		Black American	Black American
Asian American	Asian American	Asian American	Asian American
Hispanic American		Hispanic American	Hispanic American
American Indian	American Indian	American Indian	American Indian
White Female	White Female		White Female

GRIFFIN & STRONG, P.C. 2014

FINDING 6

Durham County - Statistically Significant Underutilization of MWBEs as Subcontractors

In subcontracting, MWBE's were significantly underutilized in total during the Study Period in Construction and A/E. Black American owned firms were overutilized in Services, as were White Females in Goods. Asian American, Hispanic American, and American Indian owned firms were all significantly underutilized. It is interesting to note that Non-minority Males were substantially underutilized in Services.

Again, the story is in the disaggregation of utilization by year. In A/E, there was substantial overutilization of Black American firms in 2008, but since then, there was underutilization of Black American owned firms for the remainder of the Study Period, again establishing a trend of underutilization. Similarly in Services, Black American firms were overutilized in 2008 and 2009, but were underutilized in 2010-2012.



FINDING 6

Table 6: Durham County
Summary of Statistically Significant MWBE
Underutilization in Subcontracting
July 1, 2007-June 30, 2012

CONSTRUCTION	A/E	SERVICES
Black American	Black American	
Asian American	Asian American	Asian American
	Hispanic American	Hispanic American
American Indian	American Indian	American Indian
White Female	White Female	White Female
		Non-Minority Male

GRIFFIN & STRONG, P.C. 2014

Note: As is not unusual, there was not enough subcontracting activity in the category of Goods to provide data from which inferences could be sufficiently made.

FINDING 7

Relevant Market

The relevant market for each procurement category is the area in which 75% or more of the dollars were spent during the Study Period. The relevant markets for this Study by procurement categories are:

- Construction – Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- A&E- Raleigh-Durham-Chapel Hill and Greensboro-Winston Salem-High Point CSAs
- Services – State of North Carolina
- Goods – United States

FINDING 8

Regression Analysis

GSPC tested the disparities found in contracting by the City of Durham and the County of Durham to determine if the disparities were likely caused by race/ethnicity/gender status. This was performed by controlling for non-race/ethnicity/gender factors like age of the owner, education of the owner, years in business, etc. GSPC determined that race/ethnicity/gender ownership status has an adverse effect on a firm owner's ability to win prime and subcontracting opportunities. Further, it is likely that the disparities found in prime and subcontracting by both the City of Durham and the County of Durham were caused by the race/ethnicity/gender status of the owner.

FINDING 9

Access to Capital

GSPC found that MWBEs are less likely than non-MWBEs to have access to business capital to either start or expand their businesses. This is true even though MWBEs are more likely to need capital provided by the private sector to start or expand their businesses. This is consistent with anecdotal data gathered that indicates that startup capital and bonding are important aspects of business viability and success; and that minority and Women owned businesses in the Durham relevant market area desire assistance with such matters.



FINDING 10

Anecdotal Evidence

Anecdotal evidence assisted GSPC greatly in both getting a better picture of the empirical data and understanding the perceptions of the business community in the Durham, North Carolina marketplace. Through the anecdotal interviews, telephone surveys, public hearing, focus group, and public comment, GSPC determined the following perceptions:

- A. Both the County and the City have the makings and personnel for successful programs, but the compliance departments do not seem to have the resources or power to make the changes that need to be made or enforce what is already in place.
- B. There need to be more resources available to MWBE firms so that they can be successful in winning awards as primes. The programs only focus on subcontractors so there is no business development and no opportunities to network with primes.
- C. The County and the City bid out contracts that are too large for smaller firms when there are opportunities to break down those contracts into smaller ones.
- D. Only Black American and Female owned firms are able to do business in the Durham marketplace because there is no program for any other ethnic group.
- E. Without a program minority owned firms will not be awarded contracts.
- F. There are a substantial number of female owned firms that are in fact not controlled by females, but have been certified as female owned firms in order to participate in remedial programs, therefore taking valuable contracts meant for bona fide MWBEs.
- G. The City of Durham in particular has IT problems which hinder the ability of primes to identify qualified MWBE firms and to contact them.
- H. The County's program is only strong because of the person that is running the program but the contract compliance position itself is not a full time one. This reflects the lack of organizational focus on that role.

FINDING 11

Purchasing Practices Policies and Procedure Findings

In general, there seems to be a good understanding of the practices and procedures currently in place with the City and the County. The problems seem to lie in updating IT systems and data maintenance, which is a hindrance in the dissemination of information.

The purchasing practices and policies regarding MWBEs for both the City and the County are assisting in garnering contracts for some Black American and White Female owned businesses but are not robust enough to close the disparity gap for any MWBE group.



RECOMMENDATION 1

Narrow Tailoring of MWBE Programs

There is dramatic underutilization of all MWBE as prime contractors in most work categories in awards at the City of Durham and the County of Durham, but most apparent in Construction. Although there is some overutilization of Black American and White Female owned firms on City of Durham subcontracts, it is clear that without a program there would be little or no utilization of any minority or female owned firms as is demonstrated through the Private Sector analysis

GSPC recommends that both the County and the City institute aspirational goals for minority and female subcontractors in the areas of statistically significant underutilization. This can either be effectuated through individual goals for each race/ethnicity/gender group, or it can be an overall goal that could be met by any MWBE. In this type of program, it is important that there be hands on involvement of compliance personnel to inquire when certain groups do not seem to be represented in subcontracting despite the availability of such firms to perform the needed services. Goals should be set at for just below the availability figures (either individually or combined).

The City already has dedicated personal to provide compliance, but the County should also have full time personnel solely dedicated to performing contract compliance responsibilities. GSPC believes that with the additional focus, the aspirational goal program along with the current race neutral program could return better attainment of MWBE firms.

RECOMMENDATION 2

Asian American, American Indian, and Hispanic American Goals and Outreach

Goals for these consistently underutilized groups should be established through benchmarking based on relative availability of firms in each demographic category. MWBE goals based on should be based on vendor availability in the relevant market area.

In addition, the City and County should make a concerted effort to target outreach to these underrepresented groups, including professional organizations and targeted business development nonprofits in order to advertise these new goals and encourage participation in City and County projects by Asian American, Hispanic American, and American Indian owned firms.

RECOMMENDATION 3

Joint Venture Contracts/MWBE Teams

In order to improve utilization of MWBE firms at the prime level, it is suggested that the City and County should look for instances in which MWBE capacity can be increased to match contract size through the encouragement of joint ventures. The City and County may also encourage joint ventures between MWBEs and nonminority firms on large-scale projects; however, these types of joint ventures pose the risk of potential illicit “fronts” and must be examined carefully.

RECOMMENDATION 4

Contract Sizing

The City and County should consider issuing contracts in small dollar amounts to expand the opportunities that small MWBEs have to do business with Durham.

RECOMMENDATION 5

Mentor-Protégé Programs

The City and County should consider the development of a mentor-protégé program (a suggestion that has considerable support from anecdotal evidence gathered for this study). In such a program, veteran and mid-size MWBEs serve as mentors for smaller and newer MWBE firms. The City and County may consider partnering with organizations such as Associated General Contractors, local builders associations, and other similar groups

RECOMMENDATION 6

Performance Reviews

City and County employees and user departments should be evaluated regularly based on the quality, transparency, and effectiveness of their attempts to reach procurement goals and achieve the overall goals of the MWBE programs in place.

RECOMMENDATION 7

Debriefings

Both the City and County should engage in regular debriefings with unsuccessful bidders to improve contractor awareness of the requirements of bidders and to enable them to provide more qualified or accurate responses to solicitations in the future.

RECOMMENDATION 8

Commercial Antidiscrimination Rules

An effective antidiscrimination policy may include submission and review of a Business Utilization report for evidence of discrimination. The City and County should be commended for providing officers and mechanisms for filing complaints against firms that have discriminated against MWBEs, and such mechanisms may be expanded to include a disseminated statement of due process of investigation by staff and, if necessary, the imposition of strict sanctions.

In addition, anecdotal evidence of contractor misrepresentation as White Female owned firms leads GSPC to recommend stricter policies regarding monitoring and review of such applications for certification.

RECOMMENDATION 9

Bonding Assistance Programs

Due to the results of the private sector and anecdotal analyses, Griffin & Strong, P.C. believes that it is important for the City and County of Durham to provide resources to SBE and MWBE firms by utilizing non-profit organizations for loans and bonding, and forming agreements with local banks to provide funding to small, minority, and women owned businesses recognized by the programs at the City and County. Further, the City and County should endeavor to make business owners in Durham aware of the avenues available through the Small Business Association and other bonding agencies.

.

.

RECOMMENDATION 10

Balanced Scorecard

The City and County should develop additional measures to gauge the effectiveness of their respective efforts, including

- Growth in MWBE prime contracting
- Growth in MWBE subcontracting to prime contractors
- Growth in the number of MWBEs winning first awards
- Growth in percentage of MWBE utilization
- Number of firms that receive bonding
- Number of joint ventures involving MWBEs

RECOMMENDATION 11

Increased Resources for County of Durham MWBE Program

An increase of staff and resources to the MWBE program in Durham County is recommended to ensure the necessary resources to operate the MWBE program, train the internal customers and end-users, and to track the data needed to report on accomplishments and metrics established for the program. The staff would be responsible for contract compliance monitoring, outreach, public inquiries, goal-setting, and the analysis of bid requirements.

RECOMMENDATION 12

Declining MWBE Goals

A city with a successful MWBE program implemented a hybrid program by establishing a declining schedule of race-conscious targets. In the first year of the program, the City proposed to meet 70% of its MWBE goal with race-conscious means, the second year 50%, and the third year 25%. At the end of the three year period, the program was to be evaluated.

The City and County of Durham may consider creating and funding some of these initiatives to include:

- Bond Enhancement Programs
- Access to Capital Program
- Educational Summits
- Semi-monthly MWBE payments
- Cap on the number and dollar value of set-aside contracts
- Appropriating funds necessary to implement these programs

RECOMMENDATION 13

Steering Committee

The MWBE or Contract Compliance Officers/Equal Opportunity Office alone cannot truly create the success of an SBE or MWBE program. There must first be a change in the business culture. There are key senior staff members in the City and County who should serve as a steering committee for each entity, including, in the City of Durham, the City Manager, Director of EO/EA, and User Department Heads. In the County, such a committee might include County Commissioners, representatives from the Finance Department, and the Director of the County's MWBE program. Communications strategies should be established to provide information to MWBEs and SBEs and encourage their total integration into the procurement process. The steering committee should be responsible for a quarterly review of outcomes and the monitoring of the department heads' responsibilities to implement, track, and report on the MWBE utilization efforts. Perhaps Durham City and County could consider a joint committee for the good of those Durham citizens and business owners who do business, or would like to, with both entities.

RECOMMENDATION 14

Additional Features for MWBE Websites

Each website, for both the City and County of Durham, should include the uniform certification application, program descriptions, information and resources on how to do business, bid tabulations, direct links to online purchasing manuals, capacity and experience data on certified firms, bid opportunities, vendor application, information on loan and bonding programs, and forecasts of business opportunities.

RECOMMENDATION 15

Durham County Guidelines and Internal Policies

Griffin & Strong, P.C. commends Durham County for their efforts in encouraging MWBE participation, but would like to note that there are certain current uncodified practices that are positive approaches to monitoring and administering MWBE participation that could potentially be erased unless they are instituted as written policy. Explicit guidelines and parameters are necessary for the Assistant Purchasing Manager/(MWBE) Coordinator position, as well as increased assistance from the IT department for both the Assistant Purchasing Manager/(MWBE) Coordinator position and the Purchasing Division as a whole. Furthermore, beyond the set-in-stone threshold based policies, it should be a requirement to obtain three quotes at every threshold, which could be useful in encouraging MWBE participation on small-dollar contracts.

RECOMMENDATION 16

Contractor Training and Education

It was suggested by interviewees in the anecdotal analysis that MWBE and SBE firms be given more of an opportunity to understand and ask questions about the bid specifications. This may entail the City and County (jointly or separately) providing outreach resources in the form of contractor education. A semi-regular “class” or seminar on reading bid specifications, obtaining bonding, and standard violations that may make a bid deemed unresponsive would be helpful in bridging that gap.

RECOMMENDATION 17

Online Processes

Another insight gleaned from the anecdotal analysis was that the bidding process could be easier for some business owners if the City and County provided the digital plans online instead of the contractors having to go to other physical addresses to look up the plans or paying expensive fees to have another entity pull them. In addition to this, it was noted by some interviewees within the City of Durham that the IT process should have a more explicit operating procedure by which the databases, especially for MWBE, can be updated concurrently and regularly.



CONCLUSION

Although both the City of Durham and Durham County have tried to use race neutral measures to remediate the remnants of discrimination, the results of those programs have not been sufficient to level the procurement playing field. In both cases, more robust measures are warranted, particularly by the inclusion into the City's Program of Asian American, Hispanic American and American Indian owned firms.

GSPC has made numerous recommendations for narrowly tailored remedies, both additional race-neutral activities, as well as race- and gender-conscious initiatives. GSPC will continue to assist the City and the County in fashioning its recommendations into workable policy that will benefit all members of the business community in Durham.



CITATIONS

1. See H.B. Rowe Company v. W. Lyndo Tippet, 615 F.3d 233, 251 4th Circuit (2010); Belk, et al. v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Circuit 2001); Eisenberg ex rel. v. Montgomery County Schools, 197 F.3d 123 (4th Circuit 1999); Daniel Podberesky v. University of Maryland at College Park, et al., 38 F.3d 147 (4th Circuit 1994); Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693 (1994).
2. Croson, 488 U.S. at 493. See also Freeman v. City of Fayetteville, 971 F. Supp. 971 (E.D.N.C. 1997); Cannon, et al. v. Durham County Board of Elections, 917 F. Supp. 387 (E.D.N.C. 1996).
3. Croson, 488 U.S. at 493. See also, Adarand, 515 U.S. at 235.
4. Croson, 488 U.S. at 496-97. See Miller v. Johnson, 515 U.S. 900, 922 (1995). See, e.g., Freeman, 971 F. Supp. at 975.
5. Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305, 344 (4th Circuit 2001) (quoting Croson, 488 U.S. at 493).
6. Croson, 488 U.S. at 501. See, United Black Firefighters Assn. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992). See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997).
7. Croson, 488 U.S. at 501. See, United Black Firefighters Assn., 976 F.2d at 1009. See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997).